

BRB No. 92-1793

DANFORD F. JOHNSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NORTHWEST MARINE,)	DATE ISSUED:
INCORPORATED)	
)	
and)	
)	
LEGION INSURANCE COMPANY/)	
HAMILTON BALLARD LIMITED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order and Decision On Motion For Reconsideration of Petition for Attorney Fees of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Douglas A. Swanson (Royce, Swanson & Thomas), Portland, Oregon, for claimant.

Russell A. Metz (Metz, Frol & Jorgensen, P.S.), Seattle, Washington, for the employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Decision On Motion For Reconsideration of Petition for Attorney Fees (91-LHC-2215) of Administrative Law Judge Vivian Schreter-Murray rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On April 26, 1989, claimant sustained an injury to his lower back and both elbows when he fell off a winch while working for employer as a rigger. Employer voluntarily paid claimant

temporary total disability compensation for his left arm injury from April 27, 1989, through May 13, 1989. Claimant was found to be "medically stationary" on May 30, 1990. Thereafter, claimant filed a claim seeking compensation under the schedule for a 29 percent permanent physical impairment pursuant to Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1). On July 16, 1991, Dr. Paul M. Puziss found that claimant had a 10 percent impairment of the upper extremity as a result of loss of function due to sensory deficit, pain and discomfort, and an additional 5 percent impairment due to loss of strength. On August 16, 1991, employer offered to settle the case based a 15 percent permanent physical impairment of the left arm for the sum of \$17,442.83, less attorney's fees. On September 17, 1991, claimant rejected this offer, counter-offering to settle the claim based on a 25 percent permanent physical impairment for \$29,071.38 plus attorney's fees and costs of \$3,270. The parties were unable to come to an agreement and the case was referred for a formal hearing.

On the date of the scheduled hearing, the parties stipulated that claimant was entitled to \$17,442.83 for a 15 percent permanent impairment of the left arm pursuant to Section 8(c)(1) of the Act. The administrative law judge accepted the parties' stipulations at the hearing. As the parties were unable to reach agreement as to an attorney's fee, however, the question of entitlement to an attorney's fee remained pending before the administrative law judge who advised counsel to submit a fee petition.

On February 27, 1992, claimant's attorney filed a fee petition requesting \$3,570 representing 14.25 hours of attorney services at \$140 per hour, 31.50 hours of paralegal services at \$50 per hour, and \$37.50 in costs. Employer filed objections, arguing that it was not liable for claimant's fee pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b), as claimant was not successful in obtaining greater compensation than that initially tendered by employer. Employer alternatively argued that, if a fee is awarded, it should be limited to those services rendered prior to August 16, 1991, the date of its settlement offer. Finally, employer argued that the overall fee claimed should be reduced.

In her Decision and Order, the administrative law judge, incorporating the parties' stipulations by reference, awarded claimant permanent partial disability benefits under Section 8(c)(1) for a 15 percent permanent physical impairment totalling \$17,442.83.¹ The administrative law judge further determined that claimant was not entitled to a fee payable by employer because his counsel had not succeeded in obtaining greater compensation for his client than that which was formally offered by employer on August 16, 1991. In his motion for reconsideration, claimant argued that the administrative law judge erred in failing to recognize that employer's \$17,442.83 tender included both disability compensation and attorney's fees. The administrative law judge, however, denied reconsideration, indicating that she had no record or knowledge of any agreement between counsel relating to an attorney's fee and no evidence sufficient to show that employer's offer proposed the imposition of an attorney's fee as a lien on claimant's recovery under the schedule.²

¹This figure represented 46.8 weeks of compensation at the rate of \$372.71 per week.

²In her March 19, 1992, Decision and Order, the administrative law judge incorrectly stated that claimant had requested a fee of \$6,329.75. At some point during the parties' negotiations a fee of \$6,329.75 had apparently been discussed and that fee petition had inadvertently been sent to the

Claimant appeals the administrative law judge's denial of an attorney's fee, arguing that employer is liable for claimant's fee pursuant to Section 28(b) of the Act. Claimant asserts that as employer's offer to settle the claim on August 16, 1991, for \$17,442.83 included an attorney's fee, and as claimant ultimately obtained \$17,442.83 in settlement of the disability claim alone, irrespective of an attorney's fee, this additional compensation is sufficient to support a fee award payable by employer under Section 28(b). Alternatively, claimant argues that the Board should remand the case for further development of the record on the issue of claimant's entitlement to attorney's fees. Employer responds, urging affirmance.

We agree with claimant that on the facts presented employer is liable for claimant's attorney's fee pursuant to Section 28(b). Under Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that which was paid or tendered by employer. *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

In this case, the administrative law judge erroneously determined that employer was not liable for claimant's fee under Section 28(b) because counsel was not successful in establishing claimant's right to greater compensation than that previously tendered by employer on August 16, 1991. In making this determination, the administrative law judge erroneously assumed that the monetary amount and the terms of the tender offer were the same as that which was ultimately agreed upon by the parties on the date of the hearing. In actuality, however, employer's August 16, 1991 tender offer was for \$17,442.83 in settlement of both the compensation claim and an attorney's fee. *See* Emp. Exs. 1, 2. At the hearing, the parties agreed that claimant was entitled to \$17,442.83 for his disability claim alone. *See* Tr. at 10. Because the terms of the August 16, 1991, offer of \$17,422.83 included an attorney's fee while the amount ultimately agreed upon by the parties did not, claimant was successful in establishing his right to additional compensation over that which employer tendered. Thus, counsel is entitled to an award of an attorney's fee payable by employer under Section 28(b). *See generally Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision on remand); *Kaczmarek v. I.T.O. Corp. of Baltimore*, 23 BRBS 376 (1990). Accordingly, the administrative law judge's determination that employer is not liable for claimant's attorney's fee is reversed and the case is remanded for the administrative law judge to consider counsel's fee request on the merits.

Accordingly, the administrative law judge's determination in her Decision and Order and Decision on Motion For Reconsideration of Petition for Attorney Fees that employer is not liable for claimant's attorney's fee is reversed. The case is remanded for further consideration consistent with this decision. The Decision and Order is, in all other respects, affirmed.

administrative law judge attached to employer's objections. In his motion for reconsideration, claimant raised the fact that the fee request was only for \$3,570. In her Decision on Reconsideration, the administrative law judge reaffirmed her determination that employer was not liable for a fee but modified her decision to reflect that the amount of the fee actually requested was \$3,570.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge